

# New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution

Marie Cornu\*

Marc-André Renold\*\*

**Abstract:** Alternative methods of dispute resolution are an important resource in matters of cultural heritage in addressing the return, restitution, and repatriation of cultural property. The purpose of this article is to analyze the situations in which such methods might be preferred to the classical judicial means and to examine the problems that might arise.

The article is in two parts. The first part describes the actors as well as the current methods used for the restitution and return of cultural property. The second part explores the types of property that lend themselves to alternative dispute resolution techniques and lists the—often original—substantive solutions that have been used in practice.

Alternative methods of dispute resolution enable consideration of nonlegal factors, which might be emotional considerations or a sense of “moral obligation,” and this can help the parties find a path to consensus.

## I. Introduction

1. The circumstances in which the issue of restitution of cultural property arises vary considerably. The various causes of dispossession may be trafficking (theft or unauthorized export), wartime plunder, or appropriation or trades between dealers in times of colonization or occupation. The handing back of property to the original possessor or owner is known variously as restitution, return, and repatria-

---

\*French National Centre for Scientific Research (CNRS)

\*\*University of Geneva, Art-Law Centre

ACKNOWLEDGEMENT: This article has been published in French the *Journal du Droit International* (Clunet), No. 2/2009 (April-May-June 2009), pp. 493–533. The authors wish to thank UNESCO for its kind help for the translation into English.

tion. Although there is not always a clear distinction in the texts<sup>1</sup> between these terminological variations, it is clear that the various forms of dispossession are treated differently in law, with some covered by private law instruments and others by public law.<sup>2</sup>

2. The term *restitution* is currently mostly used for property pillaged in times of war or for stolen property. According to Kowalski, it always denotes an unlawful situation.<sup>3</sup> The term *return* is preferred for property displaced for the benefit of the colonial power and restored to its country of origin, and also for cases of unlawful export. In the context of colonization, the issue of unlawfulness does not arise if the dispossession was in compliance with the national and international laws in force at the time. In such cases, the handing back of property tends to be based on the need to return irreplaceable cultural heritage to those who created it.<sup>4</sup> With unlawful exports, the property is returned to the state of origin without the question of ownership arising.<sup>5</sup> In both these situations, return depends more on the notion of territory, while restitution in the technical sense presupposes that there is an identified recipient. As far as *repatriation* is concerned, this refers to a specific form of restitution whose destination can vary: either to the country where the cultural property belongs or to the ethnic group that owns it. The term is most often used in the context of claims by indigenous peoples.

3. Subject to that, points of convergence can be seen where there are no legal means of claiming restitution, either because of the passage of time or because there has been no unlawful act. It can also happen that, once outside a state's territory, there may be limits to the protection afforded to a disputed item of property under public law, even where international conventions apply, as these are sometimes unenforceable. Nigeria's claim to the Nok statuettes, based on the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed in Paris in 1970,<sup>6</sup> was rejected by the French courts simply because that convention, ratified by France in 1997, was not directly applicable and no implementing legislation had been enacted.<sup>7</sup>

4. Besides the differences observed in the way the law treats restitution, the search for alternative forms of resolution of the various types of dispossession reveals some common features. The aim of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Unlawful Appropriation, established by UNESCO in 1978, is to seek "ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin."<sup>8</sup> Its scope is therefore extremely wide, covering thefts as well as removals during colonization<sup>9</sup>.

5. More often than not, "voluntary" restitution occurs in situations where there do not appear to be any available legal means of convincing or compelling a party to make restitution. Thus, when France agreed to enter into negotiations with Nigeria on the subject of the Sokoto and Nok statuettes unlawfully exported from Nigeria and acquired by the French state in 1999, it did so as a gesture of good-

will,<sup>10</sup> and the agreement that was reached acknowledges Nigeria's ownership of the objects, which remain on deposit with the Quai Branly Museum for 25 years, renewable by joint agreement.<sup>11</sup> The lack of legal recourse is one of the working hypotheses here, but not the only one: This article will also address techniques for avoiding formal legal proceedings.

6. Alternative means of settling conflicts of interest in the ownership of cultural property, which coexist with the traditional tools (such as bilateral or multilateral treaties), take many forms: unilateral decisions or agreements that may involve various forms of intermediary (namely, mediation, conciliation, or arbitration). In the last few decades, these consensual arrangements have become increasingly popular, both in terms of form and substance, in line with changing sensitivities regarding the restitution of cultural property. The idea that there is a moral duty to make restitution of, or pay compensation for, highly valuable or significant cultural heritage items is strongly gaining ground, especially when the dispossession dates back to a period of colonial domination. Furthermore, demands of communities are increasing, and the collective rights of indigenous peoples are more and more being recognized. As rightly stated by Pomian, "what lies behind the renewed interest in cultural property restitution over the past decades is merely an attempt to compensate for the past, which touches on outstanding historical issues, such as European colonization, the Second World War, and discrimination against indigenous peoples."<sup>12</sup> Indigenous heritage claims and the resurgence of the issue of looting have somewhat revived the process of restitution,<sup>13</sup> resulting in the appearance of complex arrangements. It may prove useful to explore the various remedies both as to the practices and methods they use (I) and the substantive solutions they offer (II).

## II. New Developments in Practices and Methods

7. Following the UNESCO General Conference held in Paris in 1978,<sup>14</sup> the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Unlawful Appropriation was established<sup>15</sup> and immediately began work on seeking interstate solutions in specific cases of restitution or return.<sup>16</sup> More recently, it was suggested that the committee's terms of reference be extended to offer mediation and conciliation to the member states.<sup>17</sup>

8. Other organizations, such as the International Council of Museums (ICOM),<sup>18</sup> the International Law Association (ILA)<sup>19</sup> and the *Institut de Droit International* have become involved in issues of return or restitution by formulating recommendations or resolutions. Mention should also be made of the work done under the auspices of the United Nations, particularly the Declaration on the Rights of Indigenous Peoples.<sup>20</sup> The proliferation of forums in which issues of restitution are discussed has undoubtedly encouraged the development of practices and meth-

ods in this field. Changes in the institutional context affect not only the dynamics of claims and the capacity of the claimants but also the terms on which returns or restitution can be arranged.

### A. *The Protagonists*

9. The restitution of cultural property has always been primarily an affair of state, and of disputes between states,<sup>21</sup> with each protagonist claiming sovereignty or ownership over cultural property of major significance. It is essentially from this angle that the issue is addressed in the 1970 UNESCO Convention,<sup>22</sup> as in the European Directive on the restitution of cultural property adopted in 1993 to provide a framework for the return of unlawfully exported national treasures.<sup>23</sup> A new development has been the emergence of other actors entitled to claim ownership of certain assets: States are not always the only parties. The question now is whether the new actors have standing to make claims based on their own heritage interests.

#### 1. The Actors Are Many and Varied

10. Two features may be distinguished in the involvement of new actors in restitution claims. First, in addition to states, there are now other public and private law entities, regional or territorial government authorities, and even museums. Second and more specifically, many claims are now being made by indigenous communities demanding the return of their heritage in the collective interest.

##### a. *Multiple holders and claimants*

11. Many cases of restitution of cultural property involve entities other than states. Museums, for example, are behind many restitutions, as borne out by numerous examples given in the journal *Museum* and the active role played by ICOM. Indeed, the ICOM Code of Ethics contains a number of recommendations that encourage the return of such property.<sup>24</sup> Some national professional organizations have also adopted ethical rules on the subject.<sup>25</sup> Recent examples of restitution of cultural property by museums include the restitution agreements concluded between several museums in the United States and Italy in 2006 and 2007.<sup>26</sup>

12. The consolidation of the cultural competences of actors other than nation-states has further widened the circle of holders or claimants in a position to lay claim to heritage on which their identity rests. This is demonstrated by the example of the final settlement of a dispute between the two Swiss cantons of Saint-Gall and Zurich over items of public cultural property that had been in Zurich's possession since 1712. One of the points in the 2006 mediation agreement was recognition of the importance of the manuscripts to the canton's identity.<sup>27</sup> Another case involves two French local districts (*communes*), both claiming paintings depicting Saint Guilhaume that had been dispersed during the Revolution and later recovered and redistributed, in disregard of the original possessor. One commune thus finds itself in possession of a painting that not only used to hang in the monastery of Gellone in the neighboring town of Saint-Guilhem-le-Désert

but also depicts the main episodes in the life of its founding father. Here, too, the link between heritage claims and identity-based attachment is evident.<sup>28</sup> The town of Saint-Guilhem-le-Désert has been attempting to recover the paintings since the mid-nineteenth century, arguing that its ownership is well known. Its claims have been repeatedly reactivated, so far unsuccessfully.

13. Finally, voluntary restitution may also be made by private individuals, art dealers, and collectors in possession of important cultural property stolen from public collections. The altarpiece of Vétheuil, an item of religious heritage stolen from a church, was later given back to France by the holder, a professional antique dealer. He had originally put the object up for sale but, with strong encouragement from his profession, eventually decided simply to make restitution.<sup>29</sup> In the other case, a bronze Roman hand held by a collector in Basel was spontaneously handed back to the Turkish authorities.<sup>30</sup> In both cases, the emblematic nature of the objects and the fact that they formed part of the national heritage may have influenced the decision. With the Turkish hand, another factor may have played a part. Switzerland and Turkey are negotiating an agreement on the import and return of cultural property as part of measures to combat trafficking, which might encourage such initiatives where no binding obligation exists. However, this does not always happen.<sup>31</sup>

*b. Indigenous peoples: New subjects of collective rights*

14. The rights of indigenous peoples, long ignored by international law, were enshrined for the first time in the Indigenous and Tribal Populations Convention (ILO Convention No. 107 of 1957),<sup>32</sup> which was amended in 1989 and renamed the Indigenous and Tribal Peoples Convention (No. 169).<sup>33</sup> Both conventions focus on nondiscrimination and the self-determination of territorial rights.<sup>34</sup> Concern about culture, which was not mentioned in the first version of the convention, is expressed in the 1989 text, although it is approached from a particular perspective.<sup>35</sup> In a section entitled “Land,” governments undertake to “respect the special importance for the cultures and spiritual values” of this bond with the land.<sup>36</sup>

15. These rights now more generally include cultural and intellectual property rights, as clearly stated in the resolution adopted by the United Nations General Assembly on September 13, 2007.<sup>37</sup> The initial premise is in the 1993 Mataatua Declaration adopted at the International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples<sup>38</sup> and the 1994 Draft Declaration on the Rights of Indigenous Peoples.<sup>39</sup> These concerns, initially enshrined in texts on the protection of basic rights, then took on a life of their own to inform cultural property law. They appear in the texts and other documents produced by UNESCO, Unidroit, and the Council of Europe.

16. The 1970 Convention thus provides, still in fairly vague terms, that a state’s cultural heritage includes “cultural property created by the individual or collective genius of nationals of the State concerned.”<sup>40</sup> References to the rights of communities are spelled out more clearly in the new generation of cultural conventions

such as the Convention for the Safeguarding of the Intangible Cultural Heritage<sup>41</sup> and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.<sup>42</sup> These two instruments are nonetheless silent on the restitution of tangible heritage, unlike the Unidroit Convention on Stolen or Illegally Exported Cultural Objects, which specifically refers to “a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community’s traditional or ritual use”<sup>43</sup> and also to their return if the export “significantly impairs” its interest.<sup>44</sup>

17. The indigenous people–heritage nexus, a notion in which various sources intersect,<sup>45</sup> has given rise to a new concept as found in the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, namely, the heritage community, which denotes the multiple nature of ownership of cultural heritage. The community consists of “people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations.”<sup>46</sup>

18. Indigenous peoples are the new subjects of rights and of some domestic laws. Several states have adopted texts that recognize the rights of their indigenous communities; the United States, especially, has passed a famous act, the Native American Graves Protection and Repatriation Act (NAGPRA), adopted in November 1990, establishing the right of Native Americans to repatriate a number of cultural objects and, in particular, the right to recover sacred objects and human remains, and requiring museums to make an inventory of them. Although the title of the act refers to graves and their contents, the scope of application of the instrument seems to cover sacred objects in general.<sup>47</sup>

19. On the basis of these texts, indigenous peoples may autonomously exercise rights over their heritage. This raises the question of the nature and intensity of those rights, which vary from one instrument to another, and the determination of what cultural property is covered. There are two distinct sets of prerogatives, both linked to the recognition of a form of moral right.<sup>48</sup> Under the United Nations resolution, indigenous peoples are empowered to control the use of cultural property and to “manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies,” which implies access to the objects that support those practices.<sup>49</sup> The text thus introduces an original mechanism in establishing a right of usage, but restitution is not obligatory in this case.<sup>50</sup> This possibility is mentioned in Article 11, which requires states to grant “redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken,” irrespective of whether the dispossession was lawful or not.<sup>51</sup> Respect for these rights may logically be secured through exchanges and negotiation, as alternatives to restitution. The solution is more radical with regard to human remains, as the text imposes a right of repatriation, formulated in more rigorous terms.<sup>52</sup>



20. Of course, the binding force of this instrument and the extent of the state's duty to return items are open to debate as it is merely a resolution. The attention given to this new generation of collective cultural rights nonetheless strengthens their legitimacy, even in legal systems under which rights may not form the basis of an action for restitution, and likewise encourages voluntary arrangements. It is as if a moral obligation of restitution was gradually being established.

21. There are several possible explanations for the recent developments in claims for restitution, and in the terms on which it is granted. Above all, new sovereignties are emerging and becoming established, in which heritage values are being constituted or reconstituted in a search for identity that then triggers the process of restitution. This is the constitutive function of heritage, and it is here that new developments are occurring. However, possessors also sometimes wish to make restitution of property for ethical or political reasons. The case of the Maori head in the Museum of Rouen is particularly illustrative of the changing sensitivity in the way such issues are approached. The head, which had become part of the Museum's collections during the trade boom of the late nineteenth century, had been donated by a collector. The City of Rouen, which owned the collections, decided to return the head. It is interesting to read the record of the debate on the matter in the Municipal Council: "in making this restitution, the City of Rouen intends to perform an ethical act. This symbolic act is an expression of due respect for the beliefs of a people who refuse to allow their culture and identity to die. This head is moreover sacred in the eyes of Maori tribes and will therefore return to its land of origin for burial in accordance with ancestral rites."<sup>53</sup> As explained below, this decision was then challenged successfully in the French courts by the French Ministry of Culture.<sup>54</sup>

22. It could also be said that, in general and despite some resistance, heritage claims are obviously strengthened by the protection of basic rights,<sup>55</sup> as is clearly apparent from recent texts on cultural heritage that have initiated changes in the way it is protected. Until recently, these texts laid greater emphasis on the preservation of objects or places, but they now concentrate increasingly on the rights of people and communities in such matters.

## 2. The Capacity of Entities to Initiate the Process of Restitution

23. The growing number of actors involved in these processes of return or restitution raises the question of the capacity to give back or receive. Who has the duty to make restitution, and to whom can a displaced object be returned? There is no one single answer.

24. In terms of the possessors, the power to dispose of the property generally lies with the owner. The statutes of some museums grant them complete freedom to make restitution. Under the agreements concluded between the Italian government and the Metropolitan Museum of Art in New York or the Museum of Fine Arts in Boston, these institutions have themselves contracted with the Italian government. Another case in point is the Australian Museum, whose statutes afford it

considerable freedom to manage its collections, thereby enabling it to effect restitutions without being obliged to request authorization and to sign contracts with other museums directly without having to go through diplomatic channels.<sup>56</sup> As this facilitates the restitution process, it is tempting to regard it as a good solution. However, is it always good for curators to decide whether or not items should be returned?

25. When the objects in question are designated as belonging to the national heritage, there is more at stake than the power of an owner over an object, even a public owner. Collective heritage entails a different form of ownership that affects freedom to dispose freely of such property. Transfer of ownership may require official authorization and is sometimes simply prohibited. The solution is derived from several sources: public property law or, in some cases, a special law of cultural property. Prohibition on disposal weighs as a major factor. The “prohibition on disposal” objection is often invoked in response to a claim for restitution,<sup>57</sup> and its meaning can vary.

26. In the English system, the rules on the inalienability of public property differ according to the property and the collections in question. Crown property may not be alienated, which is similar to the concept of the public domain (*domanialité publique*) in French law. Outside this restricted circle, the rule of inalienability can also be derived from museum statutes. National museums are individually governed by laws that impose the principle of inalienability with respect of collections that they hold on behalf of the nation. “De-accessioning” is prohibited, save in exceptional cases. National museums may dispose of, donate, or sell the objects in their collections if one of the following conditions is fulfilled: where they have a duplicate or the object is a document printed after 1850, of which the museum has a photocopy; the object has become inappropriate for the collection and may be sold without detriment to the interests of researchers or the public; or the object has become unfit, for example, due to deterioration.<sup>58</sup> The British Museum,<sup>59</sup> the Tate Gallery,<sup>60</sup> and the National Gallery are all national museums.<sup>61</sup> The statutes of other museums may also impose the inalienability of collections, but unlike the statutes of national museums, this is optional rather than obligatory.

27. Conversely, there is nothing to prevent museums (even national museums) from agreeing to long-term loans. This solution was adopted in the case of the Benvenuto Missal (a twelfth-century manuscript)<sup>62</sup> and has also been considered in relation to the Elgin Marbles. It would be for the Board of Trustees of the British Museum to make such a decision, without government interference.<sup>63</sup>

28. In other cases, special laws may override the prohibition on disposal. Under Article 47 of the 2004 Human Tissue Act, nine national museums have been authorized to “transfer from their collection any human remains which they reasonably believe to be remains of a person who died less than one thousand years before the day on which this section comes into force if it appears to them to be appropriate to do so for any reason,” provided that the requesting party provides proof of a continuous link.<sup>64</sup>



29. The inalienability of collections has been used as an argument in several cases in which French museums are or have been involved. These include human remains (Saartjie Baartman [called the Hottentot Venus] and also a Maori head) and sovereign archives.<sup>65</sup> It was argued that the objects belonged to the public domain and were therefore inalienable. The argument can, however, be overridden, as it is in many systems. Inalienability of the public domain is not a constitutional principle. The inalienability rule has to do with the public utility of the item, a special determination usually the result of a court decision, and binding even on the head of state, who may not dispose freely of such property as a gift to another state, for example. It may, however, be challenged, if necessary, by a public authority. The scope of the public domain, an operational regime that protects the public interest,<sup>66</sup> is relative, especially when the inclusion of an object is unjustified, *per se* or in the light of other interests. The reversibility of the designated status of public property is a rule common to many states. This reasoning could have been used in the case of the Hottentot Venus. The object could have been de-accessioned pursuant to an administrative decision. Owing to the strong feelings aroused by the restitution, a law was adopted that carried the weight of legal authority.<sup>67</sup> In some cases, however, prohibition on disposal is absolute. Items in French collections that may not be de-accessioned include objects donated or bequeathed—which reassures benefactors—and public property acquired by public bodies other than the state with state assistance in the form of public financial support.<sup>68</sup> Such irreversibility is open to serious question when the objects involved are part of another heritage. Nevertheless, it precludes any hope of restitution under the law as it stands.

30. Under Swiss law, property forming part of the government-owned heritage is not explicitly stated to be inalienable. However, it seems that the principle of inalienability could apply to cultural property belonging to the government-owned heritage and, more specifically, to cultural property listed in the Federal inventory of the Confederation (Article 3 of the Federal Act on the International Transfer of Cultural Property [LTBC] of June 20, 2003).<sup>69</sup> As in the French system, government-owned heritage in Switzerland is based on the notion of classification. As a result, objects that are no longer classified as being of public use or those of disputed importance (the criterion for inclusion in the federal inventory) may be de-classified under the same procedure as is used for their classification.<sup>70</sup>

31. As to the status of cultural property included in the cantonal inventories in accordance with Article 4 of the LTBC, the rules vary because cantons may declare that certain objects are inalienable and their listing is indefeasible. Systems other than those based on inalienability also exist, such as alienation subject to authorization (as in the Canton of Fribourg for protected movable property belonging to legal entities under public or canon law).<sup>71</sup>

32. Provision for free disposal by the owner does not always work to the advantage of the restitution process, as individual owners may oppose it, and the public authority or the state is powerless to force their hand. Some commentators

foresee difficulties arising regarding the “ownership of objects, collections, or documents located in museums belonging to federal states or provinces having the final decision in the field of education and culture”<sup>72</sup> or when such property is held by foundations or private individuals. A state that wishes to return property will not always be able to overcome the owners’ opposition. This may be the case, for example, with property listed in the inventories of the Swiss cantons, over which the confederation has no right, or property listed in the inventories of the German *Länder*.<sup>73</sup>

33. The parallel issue of capacity to receive property also arises. In responding to claims by indigenous peoples or other communities, can restitution be made directly to the claimants? A claim to ownership should not present problems when the holder of the right can be recognized as a natural or legal person in private or public law. A commune, region, or museum is entitled to recover possession of an object once its ownership has been established. The issue is more complex when the claimant is a community. There is still no legal recognition of collective ownership. In practice, such claims and restitutions are usually made through the state.<sup>74</sup> The Hottentot Venus, ancestor of the Khoisan community, was returned to South Africa after the South African Ambassador made an official request to France on October 26, 2000.<sup>75</sup> The City of Rouen took steps to return the Maori head to New Zealand.<sup>76</sup> Initially, Vaimaca Peru, a cacique from the Charruas ethnic group of Uruguay, could not be handed back because the Uruguayan Government did not make an official request to France.<sup>77</sup> By contrast, in 2006 Sweden returned a totem that had been displayed at the National Museum of Ethnography in Stockholm, the first object to be returned directly to a Canadian indigenous group.<sup>78</sup>

## *B. The Techniques Used*

34. The traditional tools of interstate relations are still used for the restitution of cultural property. Historically, the end of armed conflicts has often heralded the restitution of cultural property as required by peace treaties.<sup>79</sup> One example is the agreement concluded by the French Republic and the Federal Republic of Germany on the transfer of material, objects, and documents to form a museum collection for the Allied Museum in Berlin.<sup>80</sup> In more recent times, Italy and Libya agreed to the restitution by the former to the latter of many objects removed during the colonial period.<sup>81</sup> Other techniques are used alongside these older procedures, sometimes in novel ways. Restitution is either unilateral (based on laws or administrative rulings) or bilateral (negotiated with or without mediation or referred to arbitration).

### **1. Adoption of Special Laws or Unilateral Decisions**

35. A law was passed to regulate the exchange of works between France and Spain in 1941<sup>82</sup> and again in 1956 for the restitution of a set of Japanese items by the

Guimet Museum. According to the single article of that law, the French Minister of National Education was authorized to surrender to the Japanese Government, on a permanent and inalienable basis, approximately 60 objects from Japan (such as pottery, sculptures, bronzes, and items made of jade and other precious stones) for the National Museum in Tokyo.<sup>83</sup>

36. In the case of public property, in most cases there is no need to enact a law to initiate the restitution process. An administrative ruling suffices to secure removal of the objects from collections. Once they are no longer designated as being of public utility, their public domain status and the resulting restrictions on their disposal no longer apply. The objects may therefore be surrendered. The procedure is legally valid but is not always easy to implement, especially when vehemently opposed by the administration and the directors of the collections. The latter mainly fear that a precedent will be set for property considered almost sacrosanct: the nation's heritage. From that standpoint, recourse to a formal legal process makes sense, as it highlights the exceptional nature of restitution. France handed the Hottentot Venus back to South Africa in unprecedented circumstances involving the adoption of a single-article French law<sup>84</sup> authorizing the restitution. Because of the background of the case—Saartjie Baartman, to use her real name, was taken from South Africa around 1810, died in France in 1816, and her skeleton was displayed in the Musée de l'Homme until 1976<sup>85</sup>—an exceptional legal solution was the preferred option. Moreover, recourse to legislation took on a special significance here. First, the case concerned human remains, which are not simply a cultural object like any other.<sup>86</sup> Second, this method relieved the government of the responsibility of making a decision on restitution. In this case, it provided a way of overcoming its reluctance.<sup>87</sup> The question now is whether the same solution could be used to extricate France from the embarrassing case of the Maori head or the Korean manuscripts held by the Bibliothèque Nationale.<sup>88</sup> There are indeed serious doubts as to whether it is the role of legislation to resolve specific cases. But this method obviates the need to debate the merits of heritage claims and to strike a balance between two competing interests, when, as is most often the case, there are admittedly legitimate arguments on both sides.

37. In some cases, however, only a law can end the deadlock caused by inalienability. The status of British collections has already been mentioned. In view of the de-accessioning criteria and in the absence of any justifying grounds, a law was necessary to authorize the removal of human remains from public collections.<sup>89</sup>

38. With regard to unilateral restitution initiatives, the decision taken by the municipality of Geneva in the dispute on the Cazenoves frescoes is an interesting one. This dispute, well known to experts in private international law, concerned a claim to frescoes removed from a chapel in Roussillon and subsequently acquired by the Art and History Museum in Geneva. The claimants lost the case in the French courts, on the grounds of lack of territorial jurisdiction (*ratione loci*).<sup>90</sup> Reluctant to initiate proceedings in the Swiss courts, they decided to negotiate. Initially, the municipality of the City of Geneva, which has responsibility for the

Art and History Museum, agreed with the French authorities to grant a long-term loan.<sup>91</sup> A few years later, the loan was unilaterally transformed into a donation by a decision of the Administrative Council of March 19, 2003,<sup>92</sup> which has prompted questions about the legitimacy of the de-accessioning decision by the Administrative Council of the City of Geneva.

39. It was also by unilateral decision that Italy made restitution of a sculpture that had been de-accessioned from the public domain.<sup>93</sup> The decision to return the Venus of Cyrene from the museum in Rome to Libya was strongly criticized but has been upheld by the Italian courts on the grounds of the primacy of customary international law.<sup>94</sup>

## 2. Negotiated Processes

40. Private agreements can be reached after a—sometimes relatively lengthy—process of negotiation between the parties. One interesting example is the negotiation that enabled the Republic of Italy to sign agreements with the Boston Museum of Fine Arts, the Metropolitan Museum of Art of New York, and the J. Paul Getty Museum in California. None of the agreements, apart from the one signed with the Metropolitan Museum of Art,<sup>95</sup> has been published, although the broad terms have obviously been revealed, in particular through press releases.<sup>96</sup> What is interesting is the bilateral nature of the agreements: the American museums agreed to make restitution of objects of dubious provenance that might have been obtained from illegal excavations, but they did so in exchange for promises made by the Italian authorities entailing a commitment to allow international loans of similar works, some of which are specifically listed in the agreement.

41. Another type of agreement is one that follows mediation. Mediation is immensely popular at the moment and has been expressly supported by many bodies, including ICOM<sup>97</sup> and the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Unlawful Appropriation.<sup>98</sup> Although it is difficult to ascertain how many successful mediations there have been, primarily because the resulting agreements are often confidential, some are made public, especially when state entities are involved. One noteworthy example is the mediation agreement between the cantons of Saint-Gall and Zurich: the dispute between the two Swiss cantons had existed since the religious wars in the early eighteenth century.<sup>99</sup> On the basis of a provision in the Federal Constitution of 1999, the two cantons called on the confederation to act as mediator, and an agreement was signed in April 2006. Although the ownership of the cultural objects in question (mainly ancient manuscripts) was granted to the Canton of Zurich, several other elements were decided in favor of Saint-Gall, such as the long-term loan (27 years renewable) of the manuscripts and the production of an exact replica of Prince-Abbot Bernhard Muller's cosmographical globe at the expense of the Canton of Zurich.<sup>100</sup>

42. Negotiation can sometimes be used as a way of avoiding formal legal proceedings, as for example with out-of-court settlements, some of which are ratified by a court.<sup>101</sup>

43. Mediation was, quite unusually, suggested by an English judge to avoid the length and excessive expense of a trial when an Aboriginal community in Tasmania claimed human remains from an English museum. The judge invited each of the parties to appoint a mediator, and the two mediators succeeded in persuading the parties to reach an agreement permitting restitution in exchange for access to specific scientific data.<sup>102</sup>

44. Although the Intergovernmental Committee has mentioned the possibility of conciliation as an alternative method of dispute resolution,<sup>103</sup> this technique does not appear to have been used to date.

### 3. Arbitral Awards

45. Arbitration is another alternative method used, albeit rarely, in disputes over cultural property.<sup>104</sup> Article 8, paragraph 2, of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects provides that “the parties may agree to submit the dispute ... to arbitration.” The main example is the arbitration between Maria Altmann and the Republic of Austria: In an award handed down on January, 15 2006, an arbitral tribunal recognized Altmann, the sole descendent of Adèle Bloch-Bauer, as the owner of five paintings by Klimt acquired by Adèle Bloch-Bauer and subsequently looted from her husband during the Nazi period in Austria.<sup>105</sup> Much has been written about this dispute, which began in the courts of the United States, culminating in a ruling by the U.S. Supreme Court that a private individual could bring an action against a foreign state for looting in breach of public international law.<sup>106</sup> It was after that court ruling that the parties agreed to arbitrate. What is less well known is that a second arbitral award was handed down a few months later by the same arbitral tribunal, rejecting a claim to a sixth Klimt painting whose ownership history, after purchase by Adèle Bloch-Bauer, had been different from that of the other five.<sup>107</sup>

46. There is, as we have seen, a growth in use of alternative methods for the resolution of disputes over cultural property, involving a variety of actors and procedures. We will now turn our attention to the content and aims of these tools, as well as the often novel solutions they offer.

## III. NEW SUBSTANTIVE DEVELOPMENTS

47. As has been seen, the current context of restitution is changing. The question now is whether these new developments also affect the objects of restitution, that is, the way in which contractual relations are formed between claimants and holders. On the first of these, the main idea to emerge is that the items in question are

generally sacred or highly symbolic objects. As to the different arrangements made for restitution, experience shows that the instruments used vary considerably.

### *A. The Nature of the Property Claimed*

48. Our analysis here is based primarily on cultural property forming part of a state's heritage, these being the items of the highest importance whether they are in public or private hands. Looked at from this standpoint, claims mainly relate to items considered to be inseparable from the country to which they belonged.<sup>108</sup>

The Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Unlawful Appropriation chooses to focus its efforts on objects in this category. Claims may relate to objects with "a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State" that were lost "as a result of colonial or foreign occupation or as a result of unlawful appropriation." Their symbolic, sacred, or religious value or importance to the state of origin should, in principle, command respect. The difficulty is nonetheless twofold: not only of expressing the original connection but also of identifying it. Does that link take precedence over all others? In reality, the equation is more complex. Relatively speaking, other interests, too, have a claim to legitimacy by virtue of the universal notion of heritage and the dissemination of cultural plurality, or the need to protect the heritage of mankind.<sup>109</sup> Many museum collections have been established on the basis of this notion. The first questions to be resolved are whether or not the acquisition was lawful, and what effect this has on the principle of restitution or return.

#### **1. The Issue of Unlawfulness**

49. In practice, distinctions must be drawn depending on the period when a party took possession. The lawfulness criterion is obviously decisive in the case of objects procured recently, through trafficking, illegal export, or theft. In such situations, the law does not always permit restitution, for a variety of reasons such as the territoriality of criminal enforcement and the consolidation of rights by a possessor in good faith. Where no such means of compulsion exist, it is precisely that sense of unlawfulness that prompts states to make voluntary restitution or other arrangements intended to recognize the rights of the country of origin. In recent cases of theft or unlawful export, restitution has been more likely where the property in question is highly valued by the state. In such cases, not only is the burden of illegality more keenly felt, but also insufficient time has passed to lend legitimacy to any cultural link other than to the country of origin.

50. As to France's acquisition of three Nok and Sokoto objects from Nigeria for the Quai Branly Museum, appropriation is not unlawful under French law if the possessor has acted in good faith. Export of those statues was, however, prohibited in Nigeria, and they were on the ICOM Red List of stolen objects. It was this two-



fold consideration—that those objects had been trafficked and that they were of major importance—that led to the signing of an agreement recognizing Nigeria's ownership while granting a renewable long-term loan (25 years) of the objects to France. The defence of good faith could have been raised to make such an arrangement unnecessary, but it seems that in the circumstances, a negotiated solution was called for.

51. Where earlier dispossessions are concerned, the question arises in different terms. If the test used were whether the dispossession was unlawful, any principle of restitution could easily be defeated. In most situations, either it was not unlawful under the law applicable at the time, or any wrongfulness has been purged by time. Besides the fact that it may not always be possible to ascertain and evaluate the circumstances in which a dispossession occurred, it sometimes took place with the consent of the states or communities concerned. This was the case with the nineteenth century trade in Maori heads. Thus, a discussion centered on unlawfulness usually leads nowhere.<sup>110</sup>

52. Should we now revisit situations considered as scandalous and reassess their validity in the light of present-day laws or even ethical principles? A number of cases of restitution in France are colored by this spirit of repentance. The exercise is clearly a difficult one, with the obvious dangers and uncertainties involved in rejudging the past. Admittedly, periods of colonization did result in the displacement of cultural property, and this substantive loss has been harmful to some states. Would it not be preferable, however, to concentrate on the damage done to dispossessed states, rather than on the “fault,” by focusing on the breaking of the link with the state of origin and its consequences? This is the dominant approach underlying the reference to the vital nature of these tokens of cultural identity<sup>111</sup> and, in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, to the significant impairment of sacred cultural property of collective importance.<sup>112</sup> The question whether the act was lawful or unlawful becomes a secondary issue. This factor might, to a greater or lesser degree, influence the willingness to make restitution. However, it should never be a precondition of restitution, as this would provide a means of avoiding restitution in cases where it had not been established that the operation was unlawful. The United Nations Declaration on the Rights of Indigenous Peoples follows this logic when it acknowledges a right of repatriation for cultural, intellectual, religious, and spiritual objects taken with or without the consent of the populations concerned.<sup>113</sup>

## 2. The Ownership Connection

53. It remains to be determined which property is vital to and inseparable from the countries or communities that produced it, and in what way it is connected with the state considered to have a greater right to possess it. The notion of country of origin or provenance is not always clear-cut. Formally speaking, the country of origin of an object is the country that designates the object as part of its cultural heritage, by distinguishing it in some way, for example, by classifying it as a

national treasure or including it in an ad hoc record. This is the definition adopted in Council Directive 93/7/EEC of March 15, 1993, on the return of cultural objects unlawfully removed from the territory of a member state.<sup>114</sup> However, states do not always identify the cultural property that they consider important, hence the difficulty encountered in applying this criterion. In addition, this approach is unworkable when ownership is disputed and several states claim an eminent right to the same object.

54. The notion of state of origin can also be defined in terms of the genuine link between a community and a cultural object, rather than merely from a formal standpoint.<sup>115</sup> In the resolution of the *Institut de Droit International*, the country of origin of a work of art “means the country with which the property concerned is most closely linked from the cultural point of view.”<sup>116</sup> Here again, though, this classification raises awkward questions: ties of adoption may also be very strong. The prolonged possession, conservation, and long-term incorporation of an object as part of a heritage create a sense of ownership. This principle has been recognized in international instruments including the 1970 Convention on the Means of Prohibiting and Preventing the Unlawful Import, Export, and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The European Court of Human Rights also recently recalled this principle in the *Beyeler* case.<sup>117</sup> As Prott observed, some states may consider important objects originally from other countries with which their population has close cultural ties as forming part of their own heritage.<sup>118</sup> Which links must therefore be considered to be closer? Those of the original country? The adoptive homeland? Or both (by treating objects as binational)? Although this reasoning must be selective and confined to the most important objects, even in these cases it is not easy to determine the link of ownership. It may be useful to examine some actual examples of restitution. Cultural property returned to its territory of origin or the subject of agreements (exchanges, loans, etc.) tends to come from public collections, archaeological excavations, archives, and other cultural items intimately linked to the history of states, or to be sacred items and human remains. The latter two categories are often mentioned in texts relating to the cultural heritage of indigenous peoples.<sup>119</sup> It may be useful to explore in greater depth the nature of their link to one state or another.

55. As far as archives or manuscripts are concerned, some can be considered to be so closely linked to the history of a state or community that they should naturally be held in that state or community. For example, the manuscripts of the Icelandic sagas are medieval documents compiled by a scholar and then bequeathed to the University of Copenhagen in 1730 and returned in 1965 by Denmark to Iceland, which had become a sovereign state in 1918. Another example is the very early map of North America (undoubtedly one of the first) handed back to the United States by Germany.<sup>120</sup> It could also be argued that the Korean archives taken by force at the end of the nineteenth century by the French fleet in retaliation for

the massacre of missionary priests might be returned to their country of origin, as they are genuine sovereign archives, founding documents that are essential to an understanding of present-day Korea.<sup>121</sup> The link in this situation is not only cultural but also political and organic.

56. In practice, it seems to have long been acknowledged that archives must be handed back, not only in the light of their historical value but also and above all because of their sovereign import and their role in the administration of territories.<sup>122</sup> From this perspective, archives are not in the same category as other cultural property. Their restitution is, however, not always an easy matter, particularly in cases of state succession.<sup>123</sup>

57. Many sacred or ceremonial objects have also been the subject of restitution. Examples are the totem pole returned by Sweden to indigenous peoples in Canada and the Vanuatu drum handed back to its country of origin by the Australian Museum. Some museum directors think that the U.S. act, NAGPRA,<sup>124</sup> despite being silent on this specific point, requires restitution of fundamental pieces that should never have left their place of origin. This would apply, for example, of totem poles or emblematic objects. By contrast, the American Museum for Natural History has refused to hand back a meteorite, denying any link to the claimant community.<sup>125</sup> This position is debatable, in that the link of origin is simply the value attributed to an object by a community or collectivity. It might also be open to the objection that the piece is of primordial scientific importance.

58. Among the objects of sacred or symbolic value, human remains undoubtedly deserve a category of their own, denoting links to the dead and to the earth. In such cases, it is difficult to argue against the formation of a cultural link. Discussions are ongoing, for example, on requests for the restitution of Maori heads held in several large museum collections. Generalizations about human remains should be avoided, however, not only because they take many forms<sup>126</sup> but also because their status changes over time. The decision by the Michael C. Carlos Museum of Emory University of Atlanta to return the mummy of Ramses I was motivated less by respect for the dead than by its historical connection and by the desire to return the mummy to its place of origin.<sup>127</sup> And yet on another level, museums' bone collections have become the subject of scientific and documentary study, designated as "natural biological materials."<sup>128</sup> Arguably, there is scarcely anything sacred in these fragments that have long ceased to be human. Some claims show, however, that the issue is not that simple. In the dispute between the Aboriginal community of Tasmania and the British Natural History Museum concerning human remains claimed by the former, the Museum had intended to conserve the remains in order to take DNA samples as material of scientific interest for future use.<sup>129</sup>

59. The foundational dimension is also extremely relevant for objects found in archaeological excavations, also known as "soil archives," which are essential not only to an understanding of states and their history but also to their construction

and foundations. Given the cultural and political considerations at stake, these are particularly sensitive items.<sup>130</sup>

60. Last, with regard to elements removed from monuments, the link of origin is clearly strengthened by the natural attachment of the detached part to its original support. It was probably on this basis that the U.S. Appeals Court ordered the restitution of the mosaics of the Autocephalous Church,<sup>131</sup> as there was no dispute over state ownership in that case, in which an unscrupulous gallery director had acquired the mosaics under dubious conditions. Italy's restitution of the obelisk to Ethiopia was no doubt similarly motivated to ensure reconstitution of and respect for the natural attachment. The Elgin Marbles case, however, shows how difficult this solution is to implement.

61. The greatest problem lies in the fact that, in certain cases, both links are legitimate, and it is therefore not easy to rule out one in favor of the other. The idea of dual nationality, of a form of collective cultural ownership of property, is a solution that surely deserves more detailed exploration. Dispute resolution is certainly moving toward the recognition, and therefore reconciliation, of the legitimate interests of both sides. Arguments are no longer couched solely in terms of restitution and dispossession. This new perspective has definitely been influential in the emergence of alternative solutions other than restitution, which are viewed in some quarters as geared more toward rights of enjoyment and use than rights of ownership.

## *B. Methods of Restitution*

62. In current practice, the variety of restitution solutions is impressive. Negotiated agreements offer sometimes complex solutions, and there is also a tendency to "uncouple" ownership from possession. Although some solutions focus on restitution or an arrangement based on it, others provide an alternative to restitution subject to certain conditions. Joint solutions are also starting to appear. Furthermore, several specific solutions can be adopted cumulatively in one specific case, as, for example, in the mediation by the Swiss Confederation in the dispute between the cantons of Saint-Gall and Zurich over ancient manuscripts, which resulted in the simultaneous adoption of restitution, the recognition of the special cultural importance of objects that were not handed back, a long-term loan, a donation, and the production of a replica of one of the cultural objects in question, all as part of the settlement.

63. Generally speaking, there seems to be a move toward settlements that are not formally expressed in terms of victory and defeat, but rather acknowledge the existence of legitimate interests on both sides. The stage of recognizing dual nationality or a form of collective ownership has not yet been reached,<sup>132</sup> but it is clear that reconciliation of interests is becoming the solution increasingly preferred by all concerned.

64. The following is suggested as an initial categorization of possible solutions:

## 1 Restitution (simple restitution or for consideration)

65. This option appears to be the simplest: the claimant convinces the other party of the need to make restitution of the cultural property in question (where the claim is one of ownership) or return it (in the case of unlawful export). A typical case is the restitution of the five Klimt paintings ordered by the arbitral tribunal in Austria in the Altmann case.<sup>133</sup> Another example is the simple restitution of the Maori head by the City of Rouen,<sup>134</sup> although that decision was subsequently annulled.<sup>135</sup>

66. Restitution may also be associated with consideration. Thus the Aksum Obelisk was handed back to Ethiopia by Italy, which also bore all the transport, reconstruction, and restoration costs.<sup>136</sup>

## 2. Conditional Restitution

67. Closely akin to simple restitution, sometimes restitution is subject to conditions, which resembles the case of donations with obligations or conditions attached. One example concerning human remains is the restitution by the British Natural History Museum to an Aboriginal community in Tasmania, pursuant to a 2007 mediation, of the remains of 13 Aborigines on condition that some DNA samples handed back along with the remains of the bodies would not be buried with them but would be preserved for future scientific use that would require the consent of the Aborigine community.<sup>137</sup>

## 3. Restitution Accompanied by Cultural Cooperation Measures

68. Nowadays, restitution can take place in the broader framework of cooperation between the parties involved. One example is the agreement by the Metropolitan Museum of Art in New York to hand back the famous Euphronios Krater, accompanied by a series of cooperation measures between the museum and the Italian authorities. Under the agreement of February 21, 2006, the Italian authorities undertook, in exchange for the restitution, to make available to the museum as of January 15, 2008, “cultural assets of equal beauty and historical and cultural significance to that of the Euphronios Krater” via four-year international loans.<sup>138</sup> The agreement goes on to list in detail the 12 specific objects that were to be lent, with inventory numbers. The museum furthermore undertook to make other restitutions and the Italian authorities promised other loans, particularly of archaeological objects found during missions financed by the Museum (Article 7). The term of the agreement is long, since it is stated to remain in force for 40 years.<sup>139</sup>

69. The agreements signed by Italy with the Boston Museum of Fine Arts (2006),<sup>140</sup> the Getty Institute (2007),<sup>141</sup> Princeton University (2007)<sup>142</sup> and Cleveland Museum of Art (2008)<sup>143</sup> contained similar provisions.

70. Quite surprisingly, the agreements contained no choice of law clause. This means that the parties have not explicitly chosen the law applicable to their contractual relations and that this must therefore be determined by interpretation. Given that these are rather sophisticated international agreements, the lack of such

a clause may appear unusual. As the Italian state's claims are based on its public law, it is hard to see Italy agreeing to the application to those claims of a law other than its own. The American museums were probably much more in favor of the agreements being governed by the law of the United States. The result was therefore a deliberate silence, probably indicating failure to agree on this point.

71. As to disputes that might arise out of the performance of these agreements, all of them provide for International Chamber of Commerce arbitration in Paris with three arbitrators. This provision, too, is noteworthy: Despite the lack of any direct link between the agreements and international trade, disputes are referred to a center specializing in the settlement of commercial disputes.<sup>144</sup>

72. It is also of interest that the parties wanted their agreements to be registered by the UNESCO Secretariat, but UNESCO refused, which in our opinion is regrettable. While such refusal might be understandable, probably on the grounds that the agreements had not been concluded between two states, their registration would have been very useful to the international community in allowing dissemination of the general principles of the agreements, though not of their specific content, as they all contain confidentiality clauses. Furthermore, as the first generation of such agreements, it would have been desirable for UNESCO to be associated with the example set by them.

#### 4. Formal Recognition of the Importance to Cultural Identity

73. Where there is no simple or conditional restitution, agreements resulting from negotiation, mediation, or arbitration sometimes provide for formal recognition of the objects' importance to the cultural identity of one of the parties. In the mediation by the Swiss Confederation in the dispute between the cantons of Saint-Gall and Zurich over ancient manuscripts, the objects that were not handed back to Saint-Gall were nonetheless explicitly recognized by Zurich as being of great value to the identity of the Canton of Saint-Gall.<sup>145</sup>

74. Such recognition can be more than merely symbolic: In some cases, the museums that retain the cultural assets in question nonetheless agree that they may be used for ritual purposes by the community of origin.<sup>146</sup>

#### 5. Loans (long-term, temporary and others)

75. Long-term loans are a common option in this field. When no simple or conditional restitution is envisaged, the parties quite often agree to the loan of assets whose restitution was requested. Conversely, restitution may be agreed in exchange for a loan to the party from whom they are claimed.

76. An example of the first situation is the mediation by the Swiss Confederation in the dispute between the cantons of Saint-Gall and Zurich: Zurich's ownership was recognized, but the manuscripts were lent to Saint-Gall by Zurich for a potentially unlimited period.<sup>147</sup>

77. An example of the second type of long-term loan is the February 2002 agreement between France and Nigeria on the Nok and Sokoto statuettes, providing for



the recognition of Nigeria's ownership of the objects in exchange for the grant of a renewable 25-year loan to the Quai Branly Museum. Curiously enough, the press release appears to interpret the loan as a form of compensation to France for its good faith, as the objects were made available free of charge.<sup>148</sup>

78. Temporary loans are arranged when simple restitution, even where desirable, cannot be granted for technical reasons. For example, where the United Kingdom Spoliation Advisory Panel recommends that a national museum make restitution of property, such restitution would require an amendment to the law, which could be a lengthy process. As noted earlier, the Benvenuto Missal, handed back by the British National Library, was such a case.<sup>149</sup>

79. With regard to these loans, there is much discussion about the issue of restitution guarantees: Restitution proceedings could be brought against the beneficiary of the loan, and the state of origin might be minded to request some form of guarantee to avoid finding itself in such a situation.<sup>150</sup>

## 6. Donations

80. Restitution can also take the form of a donation, sometimes after considerable time. In the dispute over the Roman frescoes of Cazenoves (1984–1988),<sup>151</sup> the Museum of Art and History of Geneva, whose ownership of the frescoes was not challenged in court, had nonetheless initially agreed to lend the frescoes to their commune of origin in France.<sup>152</sup> The loan was then unilaterally transformed into a donation by the City of Geneva.<sup>153</sup>

81. The party that has ownership of the assets can also make a donation. In the mediation by the Swiss Confederation in the dispute between the cantons of Saint-Gall and Zurich over ancient manuscripts, Zurich undertook to donate to Saint-Gall a manuscript that was not one of those listed in the latter's claim.

82. There are even cases of successive donations: In October 2008 an eye from a statue of Amenhotep III was the subject of two almost simultaneous donations. The eye was first donated by a collector/purchaser to the Antikenmuseum in Basel, where it was being held, and it was at the same time donated by the museum to the Egyptian state. The eye was thus reunited with the rest of the statue of Amenhotep III, which had been reconstituted by archaeologists.

83. That said, donation is not always the appropriate solution, as it presupposes that the donor is the rightful owner of the object, which the other party often refuses to acknowledge.

## 7. Setting Up Special Ownership Regimes (joint ownership, trusts and others)

84. The imaginative powers of lawyers know no bounds. In legal proceedings concerning a Degas painting, "Landscape with Smokestacks," looted by the Nazis and subsequently purchased by a U.S. collector, the parties eventually agreed to the following arrangement: the collector gave half of the painting to the Art Institute of Chicago and the other half to the descendants of the family from which it had

been looted, with an option for the museum to purchase the second half of the painting by paying half of the painting's value based on a valuation agreed by both parties. These were the terms of an out-of-court settlement reached by the parties in August 1998.<sup>154</sup>

85. Another remarkable case is that of the Afghan cultural assets held for many years in the Afghanistan Museum-in-Exile in Bubendorf, Switzerland, with a view to safeguarding them and one day making restitution. This was a form of trusteeship that ended on the day UNESCO decided that the property in question could be handed back.<sup>155</sup>

86. Last, original solutions have been suggested in this field based on the Anglo-American trust and the Waqf in Islamic law.<sup>156</sup>

## 8. The Production of Replicas

87. The making of replicas cannot be deemed as equivalent to restitution. It is, however, a technique that can be used as one element in the resolution of a restitution claim, forming part of arrangements that are sometimes complex.

88. This solution remains little used, despite being regarded as an interesting option in this field. When the Swiss Confederation mediated between the cantons of Saint-Gall and Zurich, one of the objects in dispute was a magnificent cosmographical globe by the Prince-Abbot Bernhard Müller dating from 1554. The parties agreed that Zurich could keep the original globe, provided that it bore the cost of producing an exact replica to be given to Saint-Gall. The production of the replica was reported in detail by the local press and required considered technical skill, as the original could not under any circumstances be dismantled.<sup>157</sup>

89. Other proposals have been made, some successfully: For example, an artist offered to make a copy of Veronese's "The Wedding Feast at Cana" (the famous original of which is in the Louvre) and install it in the refectory of the monastery on the Venetian island of San Giorgio Maggiore, where the original was located before it was taken by Napoleon.

## 9. Withdrawal of the Claim for Restitution in Exchange for Financial Compensation

90. This situation is fairly common, particularly when the claimant realizes that the case is a difficult one and is more interested in financial compensation than in the work itself. Several disputes over looted assets have ended in this way, a very recent example being the case of *Schoeps v. the Museum of Modern Art and the Solomon R. Guggenheim Foundation* (both in New York) concerning two Picasso paintings that Schoeps claimed had been the subject of forced sales in Germany in 1934 by his ancestor the Berlin banker Paul von Mendelssohn-Bartholdy.<sup>158</sup>

## 10. Other Possible Solutions

91. Last, legal experts might devise many other solutions, open-endedness being one of the major advantages of mediation. Three real-life examples are given next.

First, where neither the claimant nor the possessor is particularly interested in keeping the item in question, they might agree to transfer ownership to a third party, such as a museum. Second, states claiming ownership of property belonging to their cultural heritage often decide to simply purchase the object on the market, rather than engaging in lengthy and costly legal proceedings. In such cases, the state may be said to be acquiring the object for the second time. Third, Egypt, in particular, uses the “carrot and stick” technique to bring pressure to bear on states wishing to carry out archaeological excavations on its territory: Permits have been granted only to states that have acceded to Egyptian claims.<sup>159</sup>

#### IV. Conclusion

92. A comparative analysis of international practice shows, in our opinion, that there are genuinely new developments in the restitution of cultural property, both in terms of the methods used—alternative means of dispute resolution—and the solutions proposed, with a great variety and diversity of types of restitution. Practice in this field seems to be driven by new ethical principles governing the formation of public and private collections. Cultural property is no longer acquired in the same way now as in the past, because standards and requirements have changed considerably. Interestingly, the new ethical approach seems to be having an influence even in more sensitive cases, where the passage of time and changes in what is perceived as unlawful make it more difficult to find appropriate solutions.

93. While it is probably premature to speak of the formation of an international custom making some form of return or restitution of cultural property mandatory, we can, however, observe a practice emerging coupled with a sense of obligation, based on precisely those ethical considerations that come close to the *opinio necessitatis*, the condition required for a custom to come into being. In the area of cultural property, as in many others, ethical considerations precede the formation of a rule of law.<sup>160</sup>

#### ENDNOTES

1. For example, Council Directive 93/7/EEC of 15 March 1993 (Official Journal L 074 27.3.1993 p. 74) is called the European Directive on the return of cultural objects unlawfully removed from the territory of a member state, but deals only with the return to the state of origin.

2. For a comparative study of the various forms of recourse, see the joint research study by Cornu, *Protection de la Propriété Culturelle*. The study describes the systems of China, France, the United Kingdom, and Switzerland.

3. On terminological issues, see the following two works by Kowalski, “Types of Claims” and “Restitution of Works of Art,” p. 17.

4. According to the Director-General of UNESCO, in a plea was made in 1978 for member states of the organization to conclude agreements to return such property.

5. The Directive on the return of cultural objects, cited above, thus provides for their return, leaving the question of ownership to be settled by the legislation of the state of origin.

6. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of November 14, 1970.

7. *The Federal Republic of Nigeria v. Alain de Montbrison*, Paris Court of Appeal, judgment of April 5, 2004, upheld by the Court of Cassation, judgment of September 20, 2006, J.-M. Schmitt, *Journal des Arts*, No. 256, 30 March–12 April 2007, p. 27.

8. Article 4, paragraph 1, of the statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Unlawful Appropriation of November 28, 1978.

9. For a recent overview of thinking on restitution, see Prott, *Witnesses to History*.

10. This refers to the expression *à bien plaire*, used in Switzerland to describe fulfilment of a natural obligation.

11. See the press release issued by the French Ministry of Culture on February 13, 2002. From this point of view, the term “restitution” should be used somewhat reservedly, as it merely changes the legal characterization of the situation, not the facts themselves. The objects remain in France but are now there simply on loan.

12. Pomian, *Memory and Universality*.

13. The issue of looting has grown in importance in the last decade following the adoption of principles at the Washington Conference on December 3, 1998 (see [www.lootedartcommission.com/Washington-principles](http://www.lootedartcommission.com/Washington-principles)). The text is reproduced in numerous commentaries. See, e.g., Palmer, *Museums*, especially p. 278. Many other declarations, resolutions, and other texts have subsequently been adopted by international organizations, be they institutions such as UNESCO or the Council of Europe, professional bodies such as the International Council of Museums (ICOM) and the American Association of Museums (AAM), or states adopting legislation on the matter.

14. Set up by 20 C4/Resolution 7.6/5, Records of the General Conference, 20th session, Paris, October 24–November 28, 1978, p. 97.

15. See footnote 8 above for statute.

16. The committee’s work is covered in detail in its information kit “Promote the return or the restitution of cultural property: Committee—Fund—UNESCO Conventions,” which can be found on the UNESCO web site: <http://unesdoc.unesco.org/images/0013/001394/139407eb.pdf>.

17. Working document for discussion on a strategy to facilitate the restitution of stolen or unlawfully exported cultural property, Thirteenth Session, UNESCO, Paris, February 7–10, 2005, CLT-2005/CONF.202/4.

18. The International Council of Museums is an international nongovernmental organization of museums and museum professionals for the protection of heritage and collections.

19. The International Law Association has a committee on matters relating to the protection of cultural heritage.

20. As to this, see below.

21. See Perrot, *De la Restitution*.

22. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, November 14, 1970.

23. Council Directive 93/7/EEC of March 15, 1993, cited above.

24. The ICOM Code of Ethics for Museums can be found on the organization’s web site: [www.icom.org](http://www.icom.org).

25. In particular, the American Association of Museums (AAM).

26. See, for example, the agreement between the Metropolitan Museum of Art of New York and Italy, dated February 21, 2006, annexed hereto.

27. Agreement dated April 27, 2006 between the Canton of Saint-Gall and the Canton of Zurich, with the Swiss Confederation as mediator. For the content of this agreement, see below, paragraph 43.

28. On this case, see the following two articles by Jérôme Carrière in the newspaper *Le midi libre*, “L’Église de Vendémian Veut Garder ses Tableaux” (July 29, 2005, p. 6) and “Le Tableau Restauré Revient à l’Abbaye de Gellone” (July 24, 2005).

29. The dealer had purchased the piece for €33,000 and intended to sell it for €170,000. See *Le Monde*, November 11–12, 2007.

30. The object was included in the Interpol database of stolen works of art. See the press release of the Swiss Federal Office of Culture, dated October 9, 2007: <http://www.news.admin.ch/message/index.html?lang=fr&msg-id=15062>.

31. For example, Mr. Silvio Berlusconi holds a seventeenth-century clock, stolen from the Château de Bouges in France, which belongs to the French National Historical Monuments and Sites Commission, a unique object he refuses to hand back, claiming good faith. See N. Herzberg, "Au musée des oeuvres volées," *Le Monde*, August 2, 2008.

32. Indigenous and Tribal Populations Convention (No. 107), entered into force on June 2, 1959.

33. Indigenous and Tribal Peoples Convention (No. 169), entered into force on September 5, 1991.

34. On the recognition of indigenous peoples as subjects of international law and the emergence of a law distinct from minorities law, see Rouland, *Le droit des minorités*, 348 and 391.

35. References to the notion of cultural rights became common as from the 1980s (see Rouland, *Le droit des minorités*, 461).

36. The 1957 Convention refers only to the legitimacy of the communities' individual or collective ownership rights over these lands and the possible limits thereto.

37. United Nations Declaration on the Rights of Indigenous Peoples, October 2, 2007, Resolution A/RES/61/295.

38. First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, Whakatana, 12 to 18 June 1993, Aotearoa, New Zealand.

39. Draft Declaration on the Rights of Indigenous Peoples of 1994, E/CN.4/SUB.2/1994/2/Add.1 (1994).

40. Article 4(a) of the 1970 UNESCO Convention, cited above.

41. UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, October 17, 2003.

42. UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, October 20, 2005.

43. Article 3, paragraph 8, of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of June 24, 1995.

44. Article 5, paragraph 3(d), of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of June 24, 1995.

45. Human rights and cultural heritage law.

46. Article 2 (b) of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society of October 27, 2005. Although indigenous communities are not explicitly mentioned, they are clearly included in the definition. Failure to mention indigenous peoples specifically and the emphasis laid on the heritage issue may have been intended to reassure states that were less open-minded about community demands.

47. See, as to the system overall, Baptiste Cornillier, master's degree dissertation on cultural heritage law, Faculté Jean Monnet, Sceaux, Université Paris XI, 2008; Stephen Kinzer, "Homecoming for the Totem Poles," *UNESCO Courier*, April 2001, [http://www.unesco.org/courier/2001\\_04/uk/doss23.htm](http://www.unesco.org/courier/2001_04/uk/doss23.htm).

48. The "moral right to the recovery of vital tokens of cultural identity, removed in the context of colonialism" is mentioned in a UNESCO text as an argument for countries demanding restitution, UNESCO, Paris, September 20, 1985, CLT-85/WS/41.

49. Article 1, paragraph 1, of the United Nations Declaration on the Rights of Indigenous Peoples (Resolution A/RES/61/295).

50. Contrary to the provisions of the 1994 Draft Declaration on the Rights of Indigenous Peoples, Article 12 of which concludes by referring to "the right to the restitution of cultural, intellectual, religious and spiritual property. . ."

51. The text states that the property may have been taken "without their free, prior and informed consent or in violation of their laws, traditions and customs."

52. Article 12, paragraph 1, in fine, of the United Nations Declaration on the Rights of Indigenous Peoples (Resolution A/RES/61/295).

53. Municipal Council, City of Rouen, session of October 19, 2007.

54. See below, paragraph 66.

55. The dispute over the return of human remains to an Aborigine community in Tasmania by the British Natural History Museum was apparently resolved only when the Aborigines invoked their human rights. The dispute had been ongoing for a very long period and was resolved in 2007 through mediation (see Julia May, "British Museum Hands over Aboriginal Remains," *The Age*, 28 April 2007). See Prott, *Witnesses to History*, 401.

56. For an example of a restitution on the Museum's initiative, see Specht, "The Australian Museum," 30.

57. The rule of inalienability was advanced in the objection raised by the museum, with the support of the British Government, in response to a request from Zambia concerning the Broken Hill skull. See Mulongo, "Retour et restitution."

58. On the inability to dispose of museum collections in the United Kingdom, see Vigneron, "Rapport National—Grande-Bretagne," 281. The author states that these criteria are general and apply to all national museums. However, the provisions relating to each museum must be consulted to ascertain the exact extent of the directors' powers.

59. British Museum Act, 1963.

60. National Gallery and Tate Gallery Act, 1954 (repealed on September 1, 1992).

61. National Gallery and Tate Gallery Act.

62. It was considered that this manuscript, looted during the Second World War and acquired by the British Library in good faith, should be given back to the Italian monastery of Benvento (decision of the Spoilation Advisory Panel in 2005). As restitution was not possible, it was handed over in the form of a long-term loan.

63. See Report on the activities (2002–2003) and the twelfth session of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Unlawful Appropriation, UNESCO, 32 C/REP/15, June 27, 2003.

64. Vigneron, "Rapport National—Grande-Bretagne," p. 282.

65. On the subject of Korean archives held by the Bibliothèque nationale de France (French National Library) since the late nineteenth century and the principle of inalienability, see D. Bétard, interview with Jacques Sallois, former director of the Museums of France, "Les Collections ne Sont Pas une Monnaie d'Échange," *Journal des Arts*, No. 269, November 16–29, 2007, p. 17.

66. Gaudemet, *Traité de droit administratif*, 32.

67. On the issue of restitution techniques, see below.

68. Article L 451–7 of the French Heritage Code. This is precisely what prevented the restitution of the Maori head by the City of Rouen, which owned the collections as a "Musée de France." The head had been donated to the museum at the end of the nineteenth century.

69. Gabus and Renold, *Commentaire LTBC* ad art. 3 LTBC, N 7 ff.

70. *Commentaire LTBC* ad art. 3 N 14 ss.

71. Article 19 of the cantonal law of Fribourg of November 7, 1991 on the protection of cultural property.

72. Ganslmayr, "Return and Restitution," 13.

73. See Ganslmayr, "Return and Restitution," 13. The author adds that it is precisely in these cases that alternative solutions such as loans or exchanges can prove useful.

74. The issue arises in similar terms in litigation. In the Ortiz case (*Attorney-General of New Zealand v. Ortiz and others*, House of Lords, 1983, 2 ALL ER 93), the request was made by the state of New Zealand rather than the Maori tribe concerned to avoid difficulty in determining the ownership or interest of one or other community with regard to the item. As to this, and more generally on the issue of claims for restitution made by entities other than the state, see the commentary by Muir Watt, "La Revendication Internationale," 20. In that case the problem did not arise, but the author describes more delicate situations, such as when the cultural object itself has a certain personification in the country of origin and is presented as requesting its own restitution through a spokesperson.

75. See footnote 65.

76. See paragraph 31 above.



77. The restitution took place in July 2002.

78. Restitution of the Hasila G'psgolox totem pole by Sweden to Canada (see below).

79. On the history of restitutions between states during the nineteenth and twentieth centuries, see the above-cited works of Perrot, *De la restitution*.

80. Signed in Bonn on July 5, 1995, decree No. 95–989 of August 28, 1995, Official Journal no. 205, September 3, 1995, p. 13083.

81. The December 2000 agreements are analyzed in the procedure relating to the restitution of the Venus of Cyrene to Libya by the Italian authorities, ruling by the regional administrative tribunal of Latium of February 28, 2007, upheld by the Council of State on April 8, 2008.

82. Law of July 19, 1941, Official Journal, July 20, 1941. On the terms of the exchange, see Perrot, *De la Restitution*, 192.

83. Law No. 56–631 of June 29, 1956, returning excavation objects belonging to the Guimet Museum to the National Museum in Tokyo, by way of exchange.

84. Law No. 2002–323 of March 6, 2002, on the restitution by France of the remains of Saartjie Baartman to South Africa (Official Journal No. 56 of March 7, 2002), Article 1: “From the date of entry into force of this law, the remains of the person known as Saartjie Baartman shall cease to be part of the collections of the public institution that is the national natural history museum. From the same date, the administrative authority has two months to hand them over to the Republic of South Africa.”

85. See Fabrice Naudé-Langlois, “Après la Vénus Hottentote, à Qui le Tour ?” *Le Figaro*, February 22, 2002.

86. On the particular status of human remains, see Cornu, “Le Corps Humain.”

87. This method might be used for the case of the Maori head at the Museum of Rouen. A bill has been put forward to overcome the legal difficulties relating to the restitution of part of the museum’s collection (bill to authorize the restitution by France of Maori heads, registered with the presidency of the Senate on February 22, 2008, consisting of one article based on the law of March 6, 2002, which reads as follows: “From the date of entry into force of this law, the Maori heads held by the Museums of France shall cease to be part of their collections.”

88. On the issue of the Korean archives, see International Expert Meeting on the Return of Cultural Property and the Fight against its Illicit Trafficking, meeting in Seoul, September 30–October 3, 2002, Proceedings, Korean National Commission for UNESCO, 2002.

89. See above.

90. Droz, Georges, Note sur “Fondation Abegg et Ville de Genève contre Anne Ribes et autres,” *Revue critique de droit international privé*, 1989, p. 100 ff.

91. Contract signed on July 1, 1997. See also below.

92. Administrative Council Decision of March 26, 2003: “The Council decides to agree to transform the loan into a donation from the City of Geneva to the Commune of Ile-sur-Tet of the two works, which are hereby removed from the inventory of works of art belonging to the Art and History Museums.”

93. Italian judges coined a neologism to describe this operation: *sdemanializzazione*, which means removal from the public domain.

94. Ruling of the administrative regional court of Latium, dated February 28, 2007, upheld by the Council of State on April 8, 2008.

95. Agreement between the Metropolitan Museum of Art of New York and the Republic of Italy, dated February 21, 2006, annexed hereto.

96. See below, paragraph 68.

97. See, for example, the statement made in January 2006 by the ICOM president, [http://icom.museum/statement\\_mediation\\_eng.html](http://icom.museum/statement_mediation_eng.html) and the June 2005 report of the ICOM Legal Affairs and Properties Committee, <http://icom.museum/download/68/doc-eng.doc/2005LEG06-eng.pdf>.

98. See, for example, the Draft Rules of Procedure on Mediation and Conciliation adopted at the last Committee meeting in June 2007, <http://unesdoc.unesco.org/images/0015/001509/150913e.pdf>.

99. The publicly announced agreement is annexed hereto (although the German is the official original). It is also available online: <http://www.newsservice.admin.ch/NSBSubscriber/message/attachments/2568.pdf>.

100. This agreement could encourage others, such as in the dispute between the two French Communes over the paintings of Saint Guilhem. Several attempts at negotiation have been made. The Commune of Saint-Guilhem-Le-Désert, in particular, has proposed the return of other paintings in exchange for the restitution.

101. See below for the case of settlements approved by a court in the United States.

102. See below.

103. Article 4–1 of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Unlawful Appropriation and its Draft Rules of Procedure on Mediation and Conciliation.

104. See Byrne-Sutton and Geisinger-Mariéthoz (Eds.), *Resolution Mechanisms for Art-Related Disputes* (p. 115).

105. *Maria V. Altmann, Francis Gutmann, Trevor Mantle, George Bentley v. the Republic of Austria*, arbitral award of January 15, 2006, <http://bslaw.com/altmann/Klimt/award.pdf>.

106. *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S. 677 (2004). <http://www.law.cornell.edu/supct/html/03-13.ZO.html>

107. *Maria V. Altmann, Francis Gutmann, Trevor Mantle, George Bentley v. the Republic of Austria*, arbitral award of May 7, 2006, <http://bslaw.com/altmann/Zuckerlandl/Decisions/decision.pdf>.

108. Grounds cited in the 1815 treaty that imposed on France one of the first high-profile restitutions, denying France the right to plunder works from other countries. On these periods in the history of restitution, see Perrot, *De la Restitution*.

109. See the declaration by major museums defending the idea of the universal museum in the face of contemporary movements for restitution: Declaration on the Importance and Value of Universal Museums, December 8, 2002, signed by 19 directors of major museums (see <http://www.eniar.org/news/repat50.html>). On this point and on restitution more generally, see B. Müller, “Faut-Il Restituer les Butins des Expéditions Coloniales,” *Le Monde Diplomatique*, July 2007, p. 20.

110. One example is the debate on the acquisition of the Elgin Marbles, or the pillaging of Korean archives.

111. In 1987, the United Nations recalled the arguments of claimant countries, in particular to “recognize the moral right to the recovery of vital tokens of cultural identity, removed in the context of colonialism.”

112. See especially Article 3, which refers to the idea of significant impairment and the notion of significant cultural importance.

113. Article 11(2) of the resolution adopted by the United Nations General Assembly on October 2, 2007, the United Nations Declaration on the Rights of Indigenous Peoples, cited above.

114. Cited above.

115. On the various formal and real approaches, see Armbrüster, “La revendication,” 723.

116. Resolution of the Institut de Droit International, Basel session, 1991 (see above).

117. *Beyeler v. Italy*, European Court of Human Rights, judgment no. 33202/96 of January 5, 2000.

118. Prott, *Commentaire relatif à la convention Unidroit*, 46.

119. For examples of restitution, see Palmer, *Museums and the 1987 United Nations report*.

120. This map was included on an inventory of cultural property of national importance, items comparable to national treasures within the meaning of Article 30 of the Treaty establishing the European Community.

121. On the issue of the Korean archives, see International Expert Meeting on the Return on Cultural Property and the Fight against its Illicit Trafficking, Proceedings of the Seoul meeting, September 30–October 3, 2002, Korean National Commission for UNESCO, 2002.

122. On the recognition of a specific international custom with regard to archives, see Manlio Frigo, “Les Archives et Autres Biens Culturels, Quelle Spécificité,” lecture delivered at the Faculté Jean Monnet, Sceaux, as part of the meeting “Quel Avenir pour les Archives en Europe? Enjeux Juridiques et Institutionnels,” December 2008 (proceedings to be published). On the distinction in the restitution process based on the administrative function or cultural nature of archives, see Perrot, *De la restitution*, 35.

123. On the international restitution of archives, see Ermisse, “L’actualité des contentieux” and Kecskemeti, “L’histoire des contentieux.”

124. See above.

125. It was argued that the meteorite was part of the natural landscape, rather than a sacred object. See the presentation by Ian Tattersall at the International Symposium “From anatomic collections to objects of worship: conservation and exhibition of human remains in museums,” organized by the Quai Branly Museum on February 22–23, 2008 (see web site of the Quai Branly Museum).

126. See Marin, “Statut Des Restes Humains,” 337.

127. Lufkin, “Retour au Pays,” *The Art Newspaper*, no. 154, September 12/26, 2002.

128. Ruling of September 16, 2004, setting standards for the identification, inventory, classification and processing of the movable property and scientific documentation taken from archaeological excavations and diagnostics, *Official Journal of France*, September 28, 2004.

129. Case described by Palmer, UNESCO Conference, Seoul, November 26–28, 2008. On the resulting agreement, see below.

130. See Négri, “Fouilles Archéologiques,” 325, and more generally Négri, *L’édification*.

131. United States Courts of Appeals, October 24, 1990, *Autocephalous Greek Orthodox Church of Cyprus and Republic of Cyprus v. Goldberg and Feldman Fine Arts Inc.*, and Peg Goldberg, note by Muir Watt (cited above).

132. For an original proposal for cultural property management in the form of collective ownership, see the fine thesis by Maget, *Collectionnisme public*, 625.

133. Arbitral award of January 15, 2006 (see above).

134. Deliberation of the Municipal Council of the City of Rouen of October 19, 2007.

135. Judgment of December 27, 2007, of the Administrative Tribunal of Rouen No. 702737 annulling the above-mentioned deliberation, upheld by the Administrative Court of Appeal of Douai, judgment of July 24, 2008, *Actualité Juridique—Droit Administratif (AJDA)* of October 13, 2008, *Actualité Jurisprudentielle*, p. 1896.

136. For further information on the obelisk, see the world heritage section of the UNESCO web site, <http://whc.unesco.org/en/news/456/>.

137. M. Bailey, “Natural History Museum Returns Aboriginal Remains,” *The Art Newspaper*, London no. 181, June 1, 2007, vol. 8(1), p. 1.

138. Article 4(1) of the above-cited agreement.

139. Article 8(1) of the agreement.

140. Press Release of September 28, 2006: “Museum of Fine Arts, Boston and Italian Ministry of Culture Sign Agreement Marking New Era of Cultural Exchange” ([www.mfa.org—press releases](http://www.mfa.org—press releases)).

141. Press release of September 25, 2007: “Italian Ministry of Culture and the J. Paul Getty Sign Agreement in Rome” ([www.getty.edu/news/press/center/italy\\_getty\\_joint\\_statement\\_092507.html](http://www.getty.edu/news/press/center/italy_getty_joint_statement_092507.html)).

142. Press release of October 30, 2007: “Princeton University Art Museum and Italy Sign Agreement Over Antiquities” ([www.princeton.edu](http://www.princeton.edu)).

143. Elisabetta Povoledo, “Pact Will Relocate Artifacts to Italy From Cleveland,” *New York Times*, November 20, 2008.

144. Potential disputes could also have been referred to the Arbitration and Mediation Centre of the World Intellectual Property Organization (WIPO) or the UNESCO Intergovernmental Committee.

145. Article 2, paragraph 1, of the above-mentioned mediation agreement.

146. This is the case with the meteorite conserved by the American Museum for Natural History, with which an indigenous tribe concluded an agreement requiring the meteorite to be available for it to hold its ceremonies. For more detail, see Ian Tattersall’s submission to the International Symposium “From Anatomic Collections to Objects of Worship: Conservation and Exhibition of Human Remains in Museums,” organized by the Quai Branly Museum on February 22–23, 2008 (cited above).

147. Article 4 of the mediation agreement, cited above.

148. See the press release by the French Ministry of Culture of February 13, 2002.

149. See above.

150. See the Action Plan for the EU Promotion of Museum Collections’ Mobility and Loan Standards, Finland, 2006, p. 12.

151. Cited above.
152. Loan contract of July 1, 1997, between the Museum of Art and History of the City of Geneva and the French state, represented by the Heritage Director of the Ministry of Culture.
153. Deliberation of the Municipal Council of 2003.
154. See Palmer, *Museums*, especially pp. 110–111.
155. See, e.g., Maget, *Collectionnisme public*, 577; see also “Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material,” International Law Association, Rio de Janeiro Conference (2008), *Cultural Heritage Law*.
156. Maget, *Collectionnisme public*, 628.
157. There were several articles in the Swiss newspaper *Tages Anzeiger* on the production of the replica globe in 2007 and 2008.
158. See the decision of the Federal Court of New York of February 2, 2009, ratifying the agreement between the parties. The terms of the agreement remain confidential.
159. Maget, *Collectionnisme public*, 549.
160. On this aspect, see T. Scovazzi, *Diviser, c’est Détruire, Principes Éthiques et Règles Juridiques Applicables au Retour des Biens Culturels*, paper presented to the fifteenth session of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Unlawful Appropriation, Paris, May 11–13, 2009.

## BIBLIOGRAPHY

Armbrüster, C. “La Revendication de Biens Culturels du Point de Vue du Droit International Privé.” *Revue Critique de Droit International Privé*, 93 (2004): 723ff.

Byrne-Sutton, Q., and Geisinger-Mariéthoz, F., eds. “Resolution Methods for Art-Related Disputes.” *Studies in Art Law*, vol. 11. Geneva: Schulthess, 1999.

Cornu, M., ed. Centre for Studies on International Legal Cooperation (CECOJI), *Protection de la Propriété Culturelle et Circulation des Biens Culturels—Étude de Droit Comparé Europe/Asie*. University of Poitiers/CNRS, September 2008 ([http://www.gip-recherche-justice.fr/catalogue/requete\\_resultat2.php?reference=369](http://www.gip-recherche-justice.fr/catalogue/requete_resultat2.php?reference=369))

———. “Le Corps Humain au Musée, de la Personne à la Chose?” *Recueil Dalloz* 28 (July 30, 2009): 1907. Also published as “The Human Body in the Museum: From a Person to an Object?” *Art Antiquity and Law XIV*(3) (October 2009): 219 ff.

Droze, Georges, Note sur “Fondation Abegg et Ville de Genève contre Anne Ribes et autres,” *Revue critique de droit international privé*, 1989, p. 100 ff.

Ermissé, G. “L’Actualité des Contentieux Archivistiques.” In *Archives et Patrimoine, Collection Droit du Patrimoine Culturel et Naturel*, by M. Cornu and J. Fromageau, vol. 1: 51ff. L’Harmattan, 2004.

Gabus, P., and Renold, M-A. *Commentaire LTBC (Loi Fédérale sur le Transfert International des Biens Culturels)*. Geneva: Schulthess, 2006.

Ganslmayr, H. “Return and Restitution of Cultural Property.” *Museum XXXI*, no.1 (1979): p. 62 ff.

Gaudemet, Y. *Traité de Droit Administratif des Biens*, 13th ed. Librairie Générale de droit et de Jurisprudence. Paris: 2008.

Kecskeméti, C. “L’histoire des Contentieux Archivistiques.” In *Archives et Patrimoine, Collection Droit du Patrimoine Culturel et Naturel*, by M. Cornu and J. Fromageau, vol. 1: 41ff. L’Harmattan, 2004.

Kowalski, W. “Restitution of Works of Art.” *RCADI* 288, (2001): 9ff.

———. “Types of Claims for Recovery of Lost Cultural Property.” *Museum International: Protection and Restitution* 57, no. 4/228 (2005): 85ff.

Maget, A. *Collectionnisme public et conscience patrimoniale: Les collections d'antiquités égyptiennes en Europe*. L'Harmattan, 2009.

Marin, J.-Y., “Statut des Restes Humains.” In *Le Patrimoine Religieux, Enjeux Juridiques et Pratiques Culturelles*, by B. Badevant-Guademet, M. Cornu and J. Fromageau. L'Harmattan, 2006: 337ff.

Muir Watt, H., “La Revendication Internationale des Biens Culturels: À Propos de la Décision Américaine Eglise Autocéphale,” *Revue Critique de Droit International Privé* 81, no. 1 (January–March 1992): 1ff.

Mulongo, A. H., “Retour et Restitution des Biens Culturels, L’Affaire du Crâne de Broken Hill,” *Museum* XLIV, XLIV, no. 174, XLIV, Vol., XLIV, XLIV, XLIV, no. 2, 1992.

Négri, V., “Fouilles Archéologiques et Questions de Religion.” In *Le Patrimoine Religieux, Enjeux Juridiques et Pratiques Culturelles*, by B. Badevant-Guademet, M. Cornu and J. Fromageau. L'Harmattan, 2006: 325ff.

———. *L’Édification du Droit du Patrimoine Culturel: Évolutions et Tensions*, Doctoral thesis submitted to the University of Paris XI, 2008.

Palmer, N. *Museums and the Holocaust*. London: Institute of Art and Law, 2000.

Perrot, X. *De la Restitution Internationale des Biens Culturels aux XIXème et XXème Siècles: Vers une Autonomie Juridique*. Doctoral thesis defended at the University of Limoges, December 7, 2005.

Pomian, K.. *Memory and Universality: New Challenges Facing Museums*. Public debate. Paris: UNESCO, February 5, 2007.

Prott, L. V., ed. *Commentaire Relatif à la Convention UNIDROIT*. Paris: UNESCO, 2000.

———, ed. *Witnesses to History, A Compendium of Documents and Writings on the Return of Cultural Objects*. Paris: UNESCO, 2009.

Rouland, N. *Le Droit des Minorités et des Peuples Autochtones*. Paris: Presses Universitaires France (PUF), 1996.

Specht, J. “The Australian Museum and the Return of Artefacts to Pacific Island Countries,” *Museum* XXXI, no. 1, 1979.

Vignerot, S. “Rapport National—Grande-Bretagne.” In *Protection de la Propriété Culturelle et Circulation des Biens Culturels—Etude de Droit Comparé Europe/Asie*, edited by M. Cornu. Centre for Studies on International Legal Cooperation (CECOJI), University of Poitiers/CNRS, September 2008. ([www.gip-recherche-justice.fr/catalogue/requete\\_resultat2.php?reference=369](http://www.gip-recherche-justice.fr/catalogue/requete_resultat2.php?reference=369))